IN THE

Supreme Court of the United States

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTABLER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a Corporation,

Respondents.

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

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The Congress of Industrial Organizations submits this brief as *amicus curiae* pursuant to Rule 27 of this Court. The written consent of all parties to the case to the filing of this brief has been filed with the Clerk.

INTEREST OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS

The Congress of Industrial Organizations is filing this brief because it considers that the recent decision of this Court in this case will seriously harm the labor movement, because it (1) imperils the right to strike, by opening the way for state legislatures, courts, and commissions to prohibit strikes—or

work stoppages—even in industries which are in or affect interstate commerce; and (2) creates widespread uncertainty as to the permissible scope of state regulation of labor relations.

We will also endeavor to demonstrate, in support of the petition for rehearing, that the decision of this Court is based upon a complete misapprehension as to the scope and operation of the National Labor Relations Act.

ARGUMENT

I.

The decision of this Court that, notwithstanding the provisions of the National Labor Relations Act, the states may, in certain undefined circumstances, prohibit strikes or work stoppages, even in plants which are in or affect interstate commerce, threatens the destruction of rights of the greatest importance to the labor movement. It is not too much to say that the right to strike is the most important of all rights of workers and of labor unions. It is, by and large, only through the exercise of that right—or the threat to exercise it—that workers can secure or maintain decent wages, hours, and working conditions.

It has always been the understanding of the labor organizations in this country that the right to strike, or concertedly to stop work, was protected against interference, whether by the states or by private employers, by Section 7 of the National Labor Relations Act. Now this Court has opened the door to state restriction of that right. To do that is virtually to destroy the right to strike, throughout broad regions of the country. The lengths to which underdeveloped areas will go in adopting repressive labor legislation for the purpose of attracting out of state industry are matters of common knowledge. To meet this threat to a unified and prosperous national economy a *National* Labor Relations Act is as necessary as a national wage hour act or public contracts act. To deprive the right of national protection is to destroy it. Since it is a right which is vital to the labor movement that is at stake, we respectfully request that the Court grant reargument in this case.

II.

The decision leaves in complete confusion the question of the permissible scope of state regulation of labor relations. We submit, with all deference, that no one can ascertain, from reading the Court's opinion whether it holds—

> (1) That Sections 7 and 13 of the National Labor Relations Act are inapplicable because, although the conduct prohibited by the state board constituted concerted employee activity, it was not a "strike," or
>
> (2) That the states may regulate or prohibit strikes, or other concerted employee activities, which this Court agrees are for some reason improper, or
>
> (3) That the states may prohibit strikes (or other concerted activities) because of their "tactics," but not because of their "objectives," or
>
> (4) That, under Section 7 of the national Act, the states may prohibit any activity so long as they do not make it illegal merely because it is undertaken by workers acting in concert.

It is too manifest to need stressing that industrial peace will not be promoted by such utter chaos as to the permissibility of state regulation of labor disputes.

Moreover, of the possible alternative interpretations of the opinion outlined above, it is that numbered (4) which is most strongly supported by the language of the opinion. And that construction would lead to a result opposite to that reached by the Court.

Thus the opinion of the Court declares that the purpose of Section 7 was not to guarantee to employees the right to strike, or to engage in other concerted activities, but simply to outlaw "the doctrine that concerted activities were conspiracies" and therefore illegal. The opinion declares:

> No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert.

But even under this highly restrictive construction of Section 7, the order of the Wisconsin Board could not stand. The

Wisconsin board ordered the union to cease and desist from engaging in "concerted efforts" to interfere with production by inducing work stoppages during working hours, or engaging in any other "concerted effort" to interfere with production, etc. And, according to the opinion of this Court, the Supreme Court of Wisconsin "significantly limited" the effect of the board's order by holding that

> what the order does, and all that it does, is to forbid individual defendants and members of the union from engaging in concerted effort to interfere with production by doing the acts instantly involved.

Thus, action in *concert* is exactly what is forbidden and is all that is forbidden. Workers are not forbidden to stop work individually and intermittently, even if they do so for the purpose of interfering with production. Conduct is forbidden if undertaken in concert which would be legal if undertaken individually. That is just what, this Court says, Section 7 was meant to prevent the states from doing.

III.

We submit that the Labor Management Relations Act, 1947, occupies the field of determining whether strikes or work stoppages in or affecting interstate commerce are legal or illegal, to the complete exclusion of state determination of that issue. This is entirely apart from the question whether Sections 7 and 13 of that Act explicitly bar state restriction of strikes or work stoppages.

This Court's conclusion that the national Act does not occupy the field is based upon a complete misapprehension as to the scope and operation of that Act. The Court's decision in this regard is based on its assertion that the national Act—

> gives the Federal Board no authority to prohibit or to supervise the activity which the State Board has here stopped nor to entertain any proceeding concerning it, because it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board.

This assertion is wrong, and is easily demonstrated to be wrong, in virtually every particular.

1. The national Act plainly *does* give the federal Board authority to entertain a proceeding concerning the very activity which the state Board stopped, and it very probably authorizes the federal Board "to prohibit or to supervise" the activity in question.

That activity, according to the opinion of this Court, was the inducing of intermittent work stopages over a period of five months:

> The employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them.

Section 8(b)(3) of the national Act makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer." Section 8(d) provides that:

> to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, * * *.

It is thus too plain for argument that it was within the jurisdiction of the National Board to determine whether the conduct described in the Court's opinion constituted a refusal to bargain. And it is rather clear that the conduct described did constitute a refusal to bargain. That conclusion would seem to follow from the language and policy of the statutory provision. Moreover, the National Board has declared that whether a union has engaged in a refusal to bargain will be determined by the same tests which have long applied to employers under the Wagner Act. *National Maritime Union*, 79 N.L.R.B. 971, 22 LRRM 1289, 1296-7. And it is settled that a lockout or shut-down—the employer analogue of a strike or work stoppage—for the purpose of putting pressure

on a union constitutes a refusal to bargain. See e.g., *E. C. Brown Co.*, 81 N.L.R.B. 22, 23 LRRM 1307; *Pepsi Cola Bottling Co. of Montgomery*, 72 N.L.R.B. 601.

Thus this Court seems clearly to have been laboring under a misapprehension as to what the federal Act provides when it states that—

> We think that this recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbidden by Federal statute nor was it legalized and approved thereby.

In all probability the federal Board would hold that union conduct like that described by the Court constitutes a refusal to bargain. And even if it would conclude otherwise in a particular case, it is perfectly clear that the national Act and the national Board have occupied the entire field.

2. This Court's statement that "it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board" is likewise entirely erroneous.

A refusal to bargain is a matter of tactics rather than objectives, and such a refusal brings a strike within the jurisdiction of the federal Board.

Again, Section 8(b)(1) makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of the rights guaranteed in Section 7. Restraint or coercion are matters of tactics, not objectives. They may constitute "the tactics of a strike which bring it within the power of the Federal Board." The Labor Board has so held very recently. *Wholesale and Warehouse Workers Union, Local 65*, No. 2-C.B. 109 (decided March 11, 1949).

The distinction between "objectives" as a matter for the federal Board and "tactics" as a matter for the state Board thus does not at all stand scrutiny. Even under the Wagner Act the federal Board was concerned with "tactics," because they might lead to the withholding of relief otherwise granted to employees or unions. *Labor Board* v. *Fansteel Corp.*, 306 U.S. 240. Under the Taft-Hartley Act the federal Board is directly concerned with union "tactics" because they may constitute unfair labor practices—and the very tactics which

the Wisconsin Board prohibited would probably be an unfair labor practice under the federal Act.

Since the Court's conclusion that the federal Act does not occupy the field is clearly based upon misconceptions as to the provisions and scope of the federal Act, we submit that reargument should be granted in this case.

IV.

While the matter should be fully considered on reargument, we submit the following tentative analysis as to what we believe to be the proper fields of federal and state power over strikes or work stoppages affecting interstate commerce:

1. The determination of the legality or permissibility of a strike or work stoppage is solely a matter for the federal government: i.e., normally for the federal Board, but in the case of so-called national emergency strikes for the federal executive and judiciary. This federal jurisdiction is complete and exclusive, whether the determination of legality is made upon the basis of objectives, tactics, or, as in the case of national emergency strikes, effect. The Labor Management Relations Act, 1947, has fully occupied the field.

2. The states have jurisdiction to punish or enjoin breaches of the peace. This state power is not excluded by the Commerce Clause, standing alone, and federal legislation has not occupied the field to the exclusion of state power. But this state power does not extend to prohibiting strikes or work stoppages, even when breaches of the peace occur in connection with them, but only to punishing or preventing the breaches.

CONCLUSION

For the reasons stated, it is respectfully requested that the petition for rehearing be granted.

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